TRIAL BY MEDIA: THE BETRAYAL OF THE FIRST AMENDMENT'S PURPOSE

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> Trial by jury is rapidly being destroyed in America by the manner in which the newspapers handle all sensational cases.[1]
>
> [T]hese defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated.[2]

I
INTRODUCTION

There is continuing concern in the United States about the kind of media storms that swirl around high-profile criminal proceedings such as the Sam Sheppard case,[3] the O.J. Simpson trial,[4] or the Duke lacrosse case.[5] The knowledge that the transformation of the sober and impartial investigation of guilt into a grotesque media "carnival"[6] could probably happen nowhere in the Western world other than the United States reminds us again of the distinctiveness of First Amendment jurisprudence; but the difference in this instance seems to arouse more mixed feelings in Americans than usual. As will appear below, the pernicious effect of media reportage upon public perceptions of the guilt of high-profile defendants,[7] with a possible concomitant effect upon the fairness of trials, now seems to be fairly widely accepted.

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1. Stewart Perry, *The Courts, the Press, and the Public*, 30 MICH. L. REV. 228, 234 (1931) (quoting trial lawyer Clarence Darrow).

2. Shepherd v. Florida, 341 U.S. 50, 51 (1951).

3. Sheppard v. Maxwell, 384 U.S. 333 (1966); *see* Joanne Brandwood, *You Say 'Fair Trial' and I Say 'Free Press': British and American Approaches to Protecting Defendants' Rights in High Profile Trials*, 75 N.Y.U. L. REV. 1412, 1422–24 (2000) (discussing Sheppard's case); *id.* at 1426 (on Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985)).

4. State v. Simpson, No. BA-097211 (Cal. Super. Ct. filed July 22, 1994).

5. *See, e.g.*, Susan Hanley Kosse, *Race, Riches & Reporters—Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243 (2007).

6. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 549 (1976) (discussing the impact of excessive media coverage on the public and the courtroom atmosphere).

7. *See* David A. Sellers, *The Circus Comes to Town: The Media and High-Profile Trials*, 71 LAW & CONTEMP. PROBS. 181 (Autumn 2008).

One practicing, criminal-defense lawyer describes acting for a high-profile defendant as akin to entering a "looking-glass world" in which witnesses routinely sell their stories to the press; "every scrap of . . . evidence, inadmissible or not," is leaked, stolen, or otherwise ferreted out and repeatedly published or broadcast;[8] blatant and hugely damaging falsehoods are endlessly recycled in the news coverage; and "[t]he only consistent winners are those who feed public appetites for scandal and profit from the frenzy."[9] Another defense attorney speaks from experience of the "insidious degradation of the Sixth Amendment rights to a fair trial and jury, created by a commercially-motivated press capitalizing on the insatiable public appetite for sensational criminal trials."[10] Such examples look from the outside like a betrayal by the media of the First Amendment's purpose, as lives and liberties are destroyed in pursuit of stories that sell. Meanwhile, the judges look on, too often in denial about the ineffectiveness of their attempts to root out bias in their juries, too often mouthing platitudes about the vital democratic role the media plays in scrutinizing the criminal-justice system—even as the media directly attacks its integrity.

The United States Supreme Court has referred to the right to a fair trial as "the most fundamental of all freedoms."[11] But the argument of this paper is that U.S. courts must take responsibility for failing to uphold this "fundamental" right against the media when other countries have succeeded, or at least have done better. The Supreme Court has all but ruled out the most effective way of dealing with media prejudice to trials—namely, prior restraint[12]—and there is broad agreement that penal sanctions on the press would likewise fall foul of current First Amendment doctrine.[13] Much legal discourse in this area seems to take the current interpretation of the First Amendment as an unalterable given. But the U.S. Constitution itself does not offer any guidance as to how the potential conflict between the media's right to freedom of expression under the First Amendment and the right of defendants to a fair trial under the Sixth should be reconciled.[14] It has always been open to the Supreme Court to determine, as it used to, that when the fairness of a trial is actually threatened by media coverage, then the First Amendment should temporarily defer to the Sixth:

8. Hal Haddon, *Representing a Celebrity Criminal Defendant*, 33 LITIG. 19, 19 (2007).

9. *Id.*

10. Mark Geragos, *The Thirteenth Juror: Media Coverage of Supersized Trials*, 39 LOY. L.A. L. REV. 1167, 1168 (2006).

11. Estes v. Texas, 381 U.S. 532, 540 (1965).

12. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) (striking down an order for prior restraint against the press and creating a heavy presumption against such restrictions on the media). Justice Brennan noted the "settled rule of virtually blanket prohibition of prior restraints." *Id.* at 594 (Brennan, J., concurring); *see also* Stephen Krause, *Punishing the Press: Using Contempt of Court to Secure the Right to a Fair Trial*, 76 B.U. L. REV. 537, 559 (1996) (discussing the Court's rejection of prior restraints on the press in *Sheppard* and *Nebraska Press Ass'n*); David A. Anderson, *Democracy and the Demystification of Courts: An Essay*, 14 REV. LITIG. 627, 637 (1995) ("The range of circumstances in which [prior restraints on the media] might be constitutional is so narrow that sensible judges do not even try to impose them.").

13. *See, e.g.*, Anderson, *supra* note 12, at 637–39.

14. *Neb. Press Ass'n*, 427 U.S. at 547.

recall the Court's ringing declaration in *Estes v. Texas* that "the life or liberty of any individual in this land should not be put in jeopardy because of the actions of any news media."[15]

The argument of this article, which draws upon the experiences of other countries for illumination, will be as follows: first, that the values underlying freedom of speech are not always served by an unrestricted mass media; second, that in the instance of speech prejudicial to fair trials, such values *support* rather than oppose restrictions on the media; third, that media coverage can and does have a prejudicial effect upon the fairness of trials; and fourth, that neutralizing measures designed to counter the effect of prejudicial coverage upon jurors are not reliably effective. It will conclude that U.S. courts should reconsider the constitutionality of court-ordered restrictions upon prejudicial reporting. As what follows will make clear, the third proposition—that media coverage adversely affects the fairness of trials—is widely accepted by commentators, and there is some acceptance of the fourth—the ineffectiveness of efforts to ameliorate those prejudicial effects. But there is also a great deal of judicial complacency and wishful thinking by commentators, seemingly compelled by the immovability of current First Amendment doctrine into thinking that the only available responses to media prejudice *must* work. Most important of all, the first two propositions—that free-speech values are under some circumstances better served by restricting rather than encouraging an unrestricted media—seem simply to pass under the radar of much U.S. legal discourse on the fair trial–free speech conundrum. In this article, they are drawn into the heart of that debate.

II

FREE SPEECH, JUSTIFICATIONS, THE MASS MEDIA, AND FAIR TRIALS

A. Freedom of Speech and an Unrestrained Media

The stubborn refusal of participants in most American legal discourse to reassess the current approach to the First Amendment in light of the appalling misuses of the license it grants to the media looks from the outside like a kind of blind faith[16]—a dogmatic attachment that seems to overlook *why* society values free speech in the first place. This refusal to ask whether contemporary media practice really serves the purposes behind the right to freedom of expression risks reducing the First Amendment to a "purposeless abstraction."[17] In the contemporary media age, under the pressure of the 24/7 news environment, a fiercely competitive mass-media market, and the extraordinary cult of celebrity,

15. 381 U.S. 532, 540 (1965).

16. Robert Tsai has recently noted the almost "biblical language" used by the Supreme Court in First Amendment cases. *See* Robert Tsai, *Speech and Strife*, 67 LAW & CONTEMP. PROBS. 83, 94 (Summer 2004).

17. Cass Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1765 (1995).

we should be ready to ask afresh, Does unrestrained media freedom now always serve the goals of free speech? The answer given here is an emphatic no: the uses the media makes of its freedom can often directly undermine the values underlying the right to free speech itself—human dignity, the state's duty to secure equal respect for the basic rights of all, and the foundations of a democratic society, among which must be the rule of law, a vital aspect of which is the right to a fair trial.[18] The converse therefore follows: restricting the media can actually uphold these values. Thus, rather than accept an invariable correlation between the fundamental values underlying free speech guarantees and the value of a free media, we should instead uphold a "variable geometry" of media freedom; that is, media expression should receive a varying level of support from courts enforcing constitutional guarantees of freedom of speech, depending upon how well the exercise of such freedom serves the ends of free speech itself.[19]

Thus, although media freedom should be strongly upheld when the media is carrying out its proper function in a democracy, when it is not doing so, and particularly when it is attacking the basic freedoms of others, courts should not hesitate to rein it in. As Lichtenberg put it in a seminal article:

> Unlike freedom of speech, to certain aspects of which our commitment must be virtually unconditional, freedom of the *press* should be contingent on the degree to which it promotes certain values at the core of our interest in freedom of expression generally. Freedom of the press, in other words, is an *instrumental* good: it is good if it does certain things and not especially good (not good enough to justify special protections, anyway) otherwise.[20]

The relevance of this insight for the fair trial–free speech debate is evident in the following brief survey of free-speech theory.

B. Free-Speech Justifications, the Media, and Prejudicial Speech

One of the most attractive contemporary defenses of freedom of speech is Ronald Dworkin's argument from moral autonomy: based upon the foundational principle that governments must treat all citizens with equal concern and respect, it supports the right to freedom of speech in order to prevent unpopular points of view from being silenced because state actors or majorities find them distasteful or offensive.[21] This notion has been judicially described as "a bedrock principle underlying the First Amendment."[22] However, when speech is restrained in order to protect the fairness of a trial, the state is not acting from

18. This question is raised and answered in HELEN FENWICK & GAVIN PHILLIPSON, MEDIA FREEDOM UNDER THE HUMAN RIGHTS ACT 20–32 (2006).

19. *Id.* at 27–29. As Judith Lichtenberg puts it, "[C]onsiderations internal to the theory of free speech itself may provide reasons for limiting freedom of the press." Judith Lichtenberg, *Foundations and Limits of Freedom of the Press*, 16 PHIL. & PUB. AFF. 329, 333 (1987).

20. Lichtenberg, *supra* note 19, at 332 (emphasis added).

21. *See, e.g.*, Ronald Dworkin, *Do We Have a Right to Pornography?*, *in* A MATTER OF PRINCIPLE 335 (1985); Ronald Dworkin, TAKING RIGHTS SERIOUSLY 82-130 (1977).

22. Texas v. Johnson, 491 U.S. 397, 414 (1989); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

such an illegitimate motive: a prohibition upon the reporting of highly prejudicial facts, such as previous convictions or confessions, is not premised upon governmental dislike or contempt for certain viewpoints, nor is it an attempt to suppress the development of certain ideologies, or to deprive the citizen of information about the justice system generally. Instead, restraint has the legitimate aim of protecting another individual constitutional right—the right to a fair trial under the Sixth Amendment. Such restrictions do not infringe the basic principle underlying the right to free speech: "[For] if the fair trial of an individual is arbitrarily affected by media coverage, since that individual is accused of a crime which happens to have caught public attention, the state has failed to secure *equal* access to justice."[23] Therefore, the very rationale underpinning free speech in this case requires some restriction of the media.

Much the same may be said for what is "the most influential theory in the development of 20th century free-speech law,"[24] namely, the argument based on self-government, or democracy. The argument, expounded most forcibly by Alexander Meiklejohn,[25] is that citizens cannot participate fully in a democracy unless they have a reasonable understanding of political issues; therefore, open debate and a free flow of information on such matters is essential. Plainly, this rationale strongly protects the media, and through it, public scrutiny of the justice system, an essential component of any democratic society.[26] Indeed, the arguments for open justice are so strong partly because they draw upon both classical free-speech arguments—particularly the self-government rationale—and upon those arguments associated with the right to a fair trial. The criminal-justice system, so vital to the rule of law and to the liberty of citizens in a free society, requires the "disinfectant"[27] of public scrutiny and discussion of its workings in order to ensure its proper functioning. As the Supreme Court put it in *Nebraska Press Ass'n v. Stuart*, "Commentary and reporting on the criminal justice system is at the core of First Amendment values . . . ."[28]

Too often the argument stops here. But it can and should be taken a further step: precisely *because* it is the arguments from democracy and fair trial that are used to support media freedom to comment on criminal-justice matters, speech that threatens the fairness of trials and thus undermines a central premise of any democracy—the rule of law—must by the same token, be seen as *unsupported* by the same arguments by which it is generally underpinned. The result, then, is that such speech can properly be subject to well-directed and proportionate regulation designed to safeguard the fairness of trials.

23. FENWICK & PHILLIPSON, *supra* note 18, at 173 (emphasis added).

24. ERIC BARENDT, FREEDOM OF SPEECH 20 (2d ed. 2005).

25. *See, e.g.*, Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

26. *See, e.g.*, IAN CRAM, A VIRTUE LESS CLOISTERED: COURTS, SPEECH AND CONSTITUTIONS 10–11 (2002).

27. R v. Shayler, [2003] EWCA (Crim) 2218, [21], [2003] 1 A.C. 247, [21] (Eng.).

28. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976).

The point is illuminated by examining some well-known dicta of Justice Brennan on this subject: "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and society as a whole. . . . [It] fosters an appearance of fairness, thereby heightening public respect for the judicial process."[29] All this is true in theory, and when carried out by a responsible media with respect for the fairness of trials, it is true in practice also. The crucial point, however, is that when media coverage is prejudicial, as it often is, each of the valuable purposes enumerated by Justice Brennan is in fact undermined. If the jury is rendered biased by inflammatory reporting, the "integrity of the . . . process"[30] is severely weakened, and miscarriages of justice may occur; the public will not see an "appearance of fairness"[31] when the defendant's guilt, including details of inadmissible evidence, is daily proclaimed in the media; its "respect for the judicial process"[32] cannot but be gravely undermined when guilty verdicts are overturned on a subsequent finding that a fair trial did not take place. What Justice Brennan's dicta does not grasp is the damage arguably done to the judicial system and public confidence in it when this happens: justice is denied to victims of crime, and possibly guilty and dangerous people are allowed to walk free, while it is publicly acknowledged that the justice system unfairly condemned a fellow citizen and (in many cases) deprived him of his liberty as a result.

C. Recognizing Prejudicial Speech as "Low-Value" Speech

Greater recognition of these arguments would lead to judicial reconsideration of something completely missing from the judgments at present: the question whether speech in the media that directly attacks the fairness of trials is *worthy* of protection. The stance taken in cases like *Nebraska Press Ass'n v. Stuart*[33] is simply that prior restraint is the most dangerous attack upon free speech and, constitutionally, virtually impossible to justify. However, one surely cannot meaningfully assess how pernicious prior restraint is in a particular case without *some* attempt at assessing the value or importance of the type of speech being restrained. Let us imagine, for example, that a court was being urged to prohibit the screening of a graphic pornographic film portraying the rape of young children in a way designed to arouse individuals with pedophilic tendencies. It would surely be unrealistic for the discussion to assess whether the threatened harm to society was sufficiently substantial to justify overriding the general prohibition on prior restraint without also considering the *value* of the category of expression being restrained.

To assess certain speech as "low value" does not, as Cass Sunstein has so persuasively argued, imply that one thereby hands a general license to govern-

29. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).
30. *Id.*
31. *Id.*
32. *Id.*
33. 427 U.S. 539 (1976).

ment to suppress or interfere with it.[34] Indeed, "[i]t is impossible to develop a system of free expression without making distinctions between low and high value speech, however difficult . . . that task may be."[35] This is principally because, without such a distinction, "government will be unable to control [speech such as conspiracies, child pornography, and malicious private libel] without simultaneously lowering the burden of justification [for interfering with speech generally] and thus endangering other speech that belongs at the center of constitutional concern."[36]

If judges were to recognize prejudicial speech as "low value,"[37] they would be readier to restrict it. The problem is that courts seem presently to be blindsided by the dazzle of the open-justice principle: the notion of robust and uninhibited reportage on the criminal-justice system carries with it such compelling overtones of a high and righteous purpose that judges seem to shy away from looking more closely at the type of prejudicial media expression discussed here and from recognizing it for what it is: low-value speech. This can be seen very clearly in a related area of law in the notorious decision in *Florida Star v. B.J.F.*[38] The Supreme Court held that the First Amendment protected a newspaper from civil action for its revelation of a rape victim's name, resulting in her further terrorization by her assailant, since "the commission, and investigation, of [rape]"[39] were "matter[s] of paramount public import."[40] The glaring omission in this case was the complete absence of any attempt to ask just how and why public understanding of the criminal-justice system was served by its being informed of the name and address of a particular rape victim—in other words, by the particular news report in question. In this way, First Amendment rights are painted with so broad and imprecise a brush that other rights—personal privacy, fair trial—are simply overwhelmed.

D. Judicial Reasoning: The De Facto Sacrifice of the Sixth to the First Amendment

There is a separate and narrower ground upon which the current judicial approach in this area may be criticized: at present, the manner in which cases are reasoned effectively—but illegitimately—privileges the First Amendment over the Sixth, judicial denials notwithstanding.[41] In the *Nebraska Press Ass'n*

34. Cass Sunstein, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555, 556–57 (1989).

35. *Id.* at 557.

36. *Id.* at 561.

37. So the Supreme Court regarded sexually explicit speech in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Justice Stevens, giving the judgment of the court, said: "[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." *Id.* at 61.

38. 491 U.S. 524 (1989).

39. *Id.* at 537.

40. *Id*. at 536–37.

41. For an example of the Supreme Court's repudiation of the idea that the First Amendment is privileged over the Sixth Amendment, see *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).

decision, for example, one of the key reasons for overturning the publication ban imposed by the trial court was that it had not been conclusively demonstrated that other methods of protecting the trial would be inadequate;[42] nor had it been proved that the trial would definitely be seriously prejudiced without the ban. What, then, is the effect of this reasoning? Notionally, the First and Sixth Amendments start on the same level.[43] As the rights of those affected are played out, the exercise of each right may diminish or damage the enjoyment of the other. In theory, therefore, U.S. courts could start by assuming the parity of the two rights and require each party to advance arguments as to why, in a particular case, its right should have priority. But in practice, the reasoning places the entire burden of justification—an insupportable burden in fact—on the party seeking to restrain the press. It is simply *assumed* that the media should always be free, even when their actions threaten Sixth Amendment rights, and they are never called upon to justify their prejudicial speech. In terms of the way the case is reasoned, therefore, the First Amendment is subtly but unequivocally prioritized.

42. *Id.* at 565.

43. One First Amendment scholar has argued that the Sixth Amendment is irrelevant in such situations because it does not apply to the press. *See* Hans A. Linde, *Fair Trials and Press Freedom—Two Rights Against the State*, 13 WILLAMETTE L.J. 211 (1977). This argument relies on the "state action" doctrine, whereby federal courts cannot enforce constitutional rights against private parties. But as Stephen Gardbaum has recently argued, this argument is crucially undermined by a failure to draw a vital distinction between what European lawyers term "direct" and "indirect horizontal effects." *See* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 388–91 (2003). Direct horizontal effect signifies the ability of one individual to sue another directly for breach of a constitutional right. Indirect horizontal effect, in contrast, signifies a duty upon courts to ensure that in their development and application of *existing* law governing relations between private parties, they ensure that is in conformity with constitutional values. The U.S. Constitution clearly rules out direct horizontal effect, so that one individual cannot sue another for breach of constitutional rights. But the Supremacy Clause of the Constitution, art. VI, § 1, cl. 2, means that it applies to all law, which must be compatible with it. Gardbaum, *supra*, at 418–19. Hence, in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court changed the law of private libel so that, even in the context of private litigation, the press's First Amendment rights were protected. In effect, therefore, the court enforced the First Amendment against a private litigant: Sullivan's private-law rights were limited by the court in order to uphold the free-speech guarantee. So it could be with the Sixth Amendment: individuals clearly cannot sue the press for breaching their Sixth Amendment rights, since the press are not bound to uphold them. *But the courts are*. Thus, in hearing an application to grant a gag order against the media, courts are just as much bound to uphold Sixth Amendment rights as they are the First. Therefore, courts in such situations *are* engaged in balancing competing constitutional rights. While it is true that in *Sullivan* the court was merely refraining from granting an award of damages on the basis that this would constitute an undue restriction upon First Amendment rights, whereas in the example of restraining pretrial publicity, courts would be affirmatively gagging the press, this is a distinction without a difference. Either the Bill of Rights is irrelevant in private litigation or it is not. There is no justification for applying some constitutional rights in private law and not others. Indirect horizontal effect of all relevant constitutional rights, as described above, is the approach adopted in other countries: for the position in Canada, see *Retail Wholesale and Dep't Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; for that of the South African Constitutional Court on the horizontal effect of human rights under the Interim Constitution, see *Du Plessis & Others v. De Klerk & Another* 1996 (3) SA 850 (CC) at [30]–[66]; for the U.K. position, see *Campbell v. MGN Ltd.*, [2004] UKHL 22, [132], [2004] 2 W.L.R. 1232, [132] (appeal taken from Eng.). For detailed discussion of *Campbell* and other U.K. decisions on this point, see Gavin Phillipson, *Clarity Postponed: Horizontal Effect after* Campbell, *in* HELEN FENWICK, GAVIN PHILLIPSON & ROGER MASTERMAN, JUDICIAL REASONING UNDER THE UK HUMAN RIGHTS ACT 143 (2007).

The counterargument, of course, is that because there are other ways of safeguarding the Sixth Amendment right to fair trials—jury challenges, change of venue, and so on—which do not require interferences with free speech in the media, using such methods protects *both* rights and is therefore the plainly preferable approach. The counterargument depends, however, upon its being clear that those other methods do reliably safeguard fair trials. If, in fact, there are doubts as to whether they do work—and the discussion below suggests that there are very serious doubts—then the current, absolute protection of First Amendment rights is, at the very least, putting at *risk* the right to a fair trial. Therefore, rather than assuming that they must not restrict the media unless other methods relied upon to protect fair trials are *proven* ineffective, courts should take both rights as being prima facie at risk when deciding whether to restrict reporting of trials; that is, in principle, courts should be prepared to restrict either right as seems necessary in the particular circumstances in order to protect the other. The result would be that in certain cases, in which serious prejudice seemed highly likely and there were good grounds to be doubtful about the efficacy of other measures, narrowly tailored publication bans could be considered.

The point is well illustrated by the dissenting judgment of Justice Gonthier in the leading Canadian judgment on fair trials, contempt, and free speech, *Dagenais v. Canadian Broadcasting Corp.*,[44] setting out an alternative approach to balancing these two rights:

> [E]ach party bears an initial burden of showing a Charter [of Rights] infringement. After that initial burden is discharged, . . . the balancing of competing Charter rights is incompatible with a burden on either party. Burdens are simply means of allocating uncertainty. It is appropriate in a normal [proportionality] analysis to place the burden on the government because it is required to justify legislation or action which infringes a single Charter right. Burdens are completely inappropriate where a prima facie case has been made out that the alternative courses of action (i.e., to issue a ban or not) will infringe two different Charter rights. . . . [T]he balancing . . . at the heart of the [proportionality] analysis should be carried on without privileging or disadvantaging either of the rights at issue.[45]

The U.S. courts are accustomed to scrutinizing *state action* in contravention of constitutional rights; what has happened in cases like *Nebraska Press Ass'n* is that they are applying the same test when another individual right is at stake, thus in effect depriving that right of equal status with speech rights. What is required instead is the kind of sensitive balancing advocated by Justice Gonthier and undertaken by English courts when balancing the two conflicting rights of privacy and free speech. As Lord Steyn put it in *In re S (A child)*:

> First, neither [right] has as such precedence over the other. Secondly, where the values under the two [rights] are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the jus-

44. [1994] 3 S.C.R. 835.

45. *Id.* at 922 (Gonthier, J., dissenting).

> tifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.[46]

E. Comparative Perspectives

The English approach forms a strong contrast to that in the United States. Although valuing free speech as a vital aspect of a healthy democracy and an important individual right,[47] the English courts and Parliament have made it clear that such freedom does not extend to the prejudicing of trials. Thus, once a suspect has been charged or arrested, the Contempt of Court Act of 1981[48] is activated: publication of material that creates a substantial risk of serious prejudice to the forthcoming proceedings[49] is a criminal offense.[50] Exceptionally, prior restraint may also be used.[51] This is in harmony with the approach of the European Court of Human Rights in Strasbourg, as Professor Resta's paper in this symposium illustrates.[52] There is indeed a fairly widespread consensus outside the United States that in certain cases some restriction of the press may be both legitimate and necessary in order to protect the presumption of innocence.[53]

One should not succumb to Anglo-complacency on this subject. The cogent criticisms that can be directed at the design of English contempt law and its operation in practice are well known. Critics persuasively argue that the English approach is both over- and under-inclusive—failing always to deter prejudicial speech,[54] while striking too widely in scope.[55] Moreover, other protective meas-

46. [2004] UKHL 47, [2005] 1 A.C. 593, 603 (appeal taken from Eng.); *see also Campbell*, [2004] UKHL 22 at [55]. In each of these cases, the House of Lords sought to ensure that each party's rights—to free speech and privacy, respectively—were limited only to the extent necessary to ensure as full enjoyment as possible of the other right.

47. *See, e.g.*, R v. Sec'y of State for the Home Dep't *ex parte* Simms, [2000] 2 A.C. 115, 125 (H.L.) (appeal taken from Eng.) (U.K.) (opinion of Lord Steyn).

48. Contempt of Court Act, 1981, c. 49, § 2(3), sched. 1 (defining the point in a criminal investigation at which the provisions of the statute are activated).

49. This is the test set out in Contempt of Court Act § 2(2). *See, e.g.*, Attorney Gen. v. MGN Ltd., (1997) 1 All E.R. 456 (Eng.) (considering and applying the test).

50. Freedom to comment on forthcoming trials as a way of raising broader issues is preserved by Contempt of Court Act § 5: a good-faith discussion of public affairs will not incur liability when reference to the trial is only incidental to the main thrust of the article.

51. Contempt of Court Act, 1981, c. 49, § 4(2). Broad powers to issue injunctions arise from the Supreme Court Act, 1981, c. 54, §§ 37(1), 45(4). *See also Ex parte* HTV Cymru (Wales) Ltd., [2002] E.M.L.R. 11, 50 (considering and applying this provision).

52. Giorgio Resta, *Trying Cases in the Media: A Comparative Overview*, 71 LAW & CONTEMP. PROBS. 31 (Autumn 2008).

53. The leading decisions in Canada, Australia, and New Zealand are all characterized by a rejection of the U.S. approach. *See* Dagenais v. Canadian Broad. Corp., [1994] 3 S.C.R. 835, [73] (Can.); Gisborne Herald Co. v. Solicitor-Gen., [1995] 3 N.Z.L.R. 563 (C.A.); Hinch v. A-G (Vict.) (1987) 164 C.L.R. 15. The article by Professor Resta in this symposium deals with the approach of a number of European jurisdictions and of the European Court of Human Rights: all contrast sharply with that of the United States. *See* Resta, *supra* note 52.

54. FENWICK & PHILLIPSON, *supra* note 18, at 252–57.

55. Cram, *supra* note 26, is particularly critical. For an argument that narrowly tailored prior restraints would be preferable to post-trial criminal sanctions, see FENWICK & PHILLIPSON, *supra* note 18, at 216–23, 303–10.

ures, such as the jury challenge, are undoubtedly underused by English courts.[56] There are also well-founded concerns about the efficacy of bans applying to the U.K. media in the age of the Internet, when bloggers based abroad and easy access to U.S. newspapers online may allow British jurors access to prejudicial material, even when the main U.K. media organs do not publish it.[57] It is readily conceded that, in a particular case, this point may well raise questions as to whether an order restraining reporting should be made; but what it does *not* do is justify *ruling out in advance* the possibility of controls on the media. In many cases, reporting bans would still radically decrease the likelihood of jurors encountering prejudicial material and thus substantially *increase* the possibility of empanelling an unbiased jury and achieving a fair trial.

III

NEUTRALIZING MEASURES AND THEIR EFFECTIVENESS

It is necessary now to examine the effectiveness of the other methods of safeguarding trials, which, it is claimed, render restrictions upon the media unnecessary and thus restrictions upon media freedoms disproportionate. Do these neutralizing methods—relied upon so heavily by American courts—reliably work? An unbiased reading of the available research suggests otherwise.[58] A crucial point is that it is not so much expressions of opinion, but revelations of fact—particularly inadmissible evidence—that are really damaging. One attorney notes the press's belief that "it has a First Amendment right to access and publish every scrap of potential evidence, inadmissible or not, well before trial."[59] And it is just the dissemination of such material that causes the most serious damage to the presumption of innocence. As two leading U.S. commentators have put it, "The greatest danger to fair trial in a jury case arises when the Press publishes evidence not admissible at the trial, such as a coerced confession or the defendant's criminal record."[60] Another summarizes the U.S. research as finding that "revelations of prior convictions, [and] recanted [or other inadmissible] confessions create a . . . persistent bias in the minds of prospective jurors."[61] In one study, "more than 72% of jurors exposed to . . . stories containing inadmissible evidence voted to convict, whereas less than 44% of voters not exposed . . . [did so]."[62]

56. For examples of such arguments, see sources cited by Brandwood, *supra* note 3, at 1443, and the "Anglo-Canadian" approach suggested by Justice Gonthier for the Canadian Supreme Court in *Dagenais*, [1994] 3 S.C.R. at 932 (opinion of Gonthier, J.).

57. *See, e.g.*, Brandwood, *supra* note 3, at 1440–41.

58. Only a brief summary can be included here due to space constraints.

59. Haddon, *supra* note 8, at 23.

60. Richard Donnelly & Ronald Goldfarb, *Contempt by Publication in the United States*, 24 MOD. L. REV. 239, 245 (1961).

61. Brandwood, *supra* note 3, at 1418; *see also id*. nn. 28–33 (citing research supporting this conclusion).

62. Christina Studebaker & Steven Penrod, *Pretrial Publicity: the Media, the Law and Common Sense,* 3 PSYCHOL. PUB. POL'Y & L. 428, 433 (1997).

It would seem remarkable for anyone to contest these findings as to the effect of such evidence on a jury: it is the very reason for rendering previous convictions generally inadmissible and for the strict rules all democracies have governing police conduct and the obtaining of confessions. One high-profile attorney has remarked: "I have tried cases where material was excluded from evidence because it was too prejudicial for the jury to hear, only to have the same material broadcast and printed so often that the jurors later actually thought it was presented as evidence."[63] The U.S. judiciary has shown some recognition of this problem. In *Marshall v. United States*, the Supreme Court acknowledged that "prejudice to the defendant is almost certain to be as great" when inadmissible evidence is published in the media as when introduced by the prosecution.[64] However, this principle is confined to federal trials;[65] mystifyingly, the Supreme Court has refused to extend *Marshall* to state trials,[66] and there are spectacular examples of judicial denial on this issue.[67]

Such media behavior can not only produce a substantial risk of prejudicing the trial, but it attacks the rule of law more directly. The Supreme Court has itself noted that "the exclusion of such evidence in court is rendered meaningless when news media make it available to the public."[68] Barendt summarizes Frederick Schauer's argument on this point: "[N]o lawyer has the right to evade the rules of evidence and procedure carefully designed to produce a fair trial by holding a press conference at which he leaks to the media the inadmissible evidence. It is hard to see why the media should have such a right."[69] To put it more bluntly, such a practice makes "a nonsense of the rules of evidence."[70]

What, then, as to the efficacy of neutralizing measures? Belief in their effectiveness is complacent—and such complacency is particularly strong amongst the judges, many of whom appear to be unaware of the empirical research in the area, and have an exaggerated faith in their own ability to neutralize, through jury instructions, any prejudice in the jury resulting from media coverage[71] (if indeed any risk of prejudice is acknowledged at all). Thus, one commentator remarks that, "despite strong . . . evidence to the contrary, many

63. Geragos, *supra* note 10, at 1177.

64. 360 U.S. 310, 312–13 (1959).

65. Brandwood, *supra* note 3, at 1428.

66. Murphy v. Florida, 421 U.S. 794 (1975) (affirming a district court's denial of plaintiff's habeas corpus relief to overturn his conviction on account of prejudicial pretrial publicity).

67. *See, e.g.*, Patton v. Yount, 467 U.S. 1025 (1984). In *Patton*, the Court held that widespread pretrial adverse publicity and community outrage about the crime did not jeopardize the fairness of the defendant's trial. The jury was presumed to be impartial, even though most potential jurors questioned on voir dire remembered the unfavorable publicity and admitted they would be unable to set aside the opinions they had formed.

68. Sheppard v. Maxwell, 384 U.S. 333, 360 (1966).

69. BARENDT, *supra* note 24, at 322 (summarizing Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 692–94 (1997)).

70. *Id.*

71. For a particularly blatant example, see Dagenais v. Canadian Broad. Corp., [1994] 3 S.C.R. 835, 878–81 (Can.) (opinion of Lamer, C.J.) (citing none of the published evidence and relying solely on expressions of confidence as to the efficacy of admonishment made by judges in other cases).

American judges doubt that publicity can prejudice criminal trials."[72] Justice Brennan in *Nebraska Press Ass'n* refers to "adequate devices" for identifying and excluding biased jurors,[73] placing great weight on the efficacy of questioning jurors as to their exposure to pretrial publicity and its effects on them. Admonishment to disregard is still relied upon, despite its being the least effective method of correcting such effects, as the published research indicates.[74] Perhaps this judicial wishful thinking reflects the basic dilemma of American judges: Courts are unable to seriously consider gagging the media but equally unable to admit they are thereby putting at risk the administration of justice, their particular area of constitutional responsibility. In such a situation the obvious judicial temptation is to allow the *desire* to believe that existing remedies must be effective to convince judges that they really are: thus wishful thinking replaces evidence.[75]

What, then, about the efficacy of remedies other than admonishment? Sequestrations take place very rarely, are expensive, place "monstrous" burdens on jurors,[76] particularly in long trials, risking "breed[ing] jury resentment [and thus] anti-defendant bias," and moreover can do nothing about the effects of *pre*trial publicity.[77] Delay of the trial is doubly unsatisfactory: it renders trials less likely to do justice, with the fading of relevant events from witnesses' memories, and it is also contrary to the guarantee of a prompt trial in the Sixth Amendment,[78] something acknowledged in Justice Brennan's concurrence in *Nebraska Press Ass'n.*[79] Change of venue, in response to prejudicial coverage in a particular area, may no longer be effective in the age of the Internet, when newspapers keep archives of back issues obtainable online. Nor will it assist when the prejudicial publicity was carried by national newspapers or television stations. Moreover, change of venue is "very unpopular with trial courts" and so

72. Brandwood, *supra* note 3, at 1416 (citing Studebaker & Penrod, *supra* note 62, at 433 (social-science evidence) and Robert Drechsel, *An Alternative View of Media–Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial–Free Press Issue*, 18 HOFSTRA L. REV. 1, 16 (1989) (views of the judges)). Brandwood also cites Joseph Mariniello, Note, *The Death Penalty and Pre-Trial Publicity: Are Today's Attempts at Guaranteeing a Fair Trial Adequate?*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 371, 387 (1994) on this point. *Id.* at 1417 n.24.

73. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 601 (1976) (Brennan, J., concurring).

74. For examples of research indicating the ineffectiveness of jury instructions, see Geoffrey P. Kramer, Norbert L. Kerr & John S. Carroll, *Pretrial Publicity, Judicial Remedies and Jury Bias*, 14 LAW & HUM. BEHAV. 409, 430–35 (1990); Newton Minow & Fred Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 648 & n.109; *see also* T. M. Honess, *Empirical and Legal Perspectives on the Impact of Pre-Trial Publicity*, CRIM. L. REV. 719, 723 (2002) (citing S.M. Kassin & C.A. Studebaker, *Instructions to Disregard and the Jury: Curative and Paradoxical Effects*, *in* INTENTIONAL FORGETTING: INTERDISCIPLINARY APPROACHES (Jonathan M. Golding & Colin M. MacLeod eds., 1998)). *See also* Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.").

75. As Minow & Cate, *supra* note 74, put it: "courts, perhaps believing that no other alternatives exist, continue to rely on these inadequate remedies." *Id.* at 654.

76. *See* R v. Keegstra (No. 2) (1992) 127 A.R. 232, 235 (Can.)(opinion of Kerans, J.A.).

77. Krause, s*upra note* 12, at 565.

78. BARENDT, *supra* note 24, at 332.

79. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 602 n.28 (1976) (Brennan, J., concurring).

"rarely grant[ed]."[80] Finally, when a case attracts sustained national coverage, it may be difficult or impossible to find jurors who have not encountered the coverage.[81]

Questioning jurors as to whether they are prejudiced is not to be counted on either: research has found that jurors cannot reliably assess their own degree of prejudice or may not be honest when questioned about it.[82] There is also evidence of "stealth jurors," who deliberately seek a seat in high-profile trials in order to convict someone they believe guilty, or in the hope of financial gain from the media, or simply to participate in a "celebrity" occasion.[83] One prominent defense attorney concludes that "these solutions (voir dire, change of venue, and so on) are no longer feasible in [high-profile] cases."[84] In any event, the Supreme Court has held that there is no constitutional right for the defense to question individual jurors as to possible bias.[85]

Another possible solution to counter the effect of media bias on jurors is to issue court orders restraining attorneys and others from giving information to the press. However, given that many leaks to the press are anonymous and that generally the media cannot be required to disclose its sources,[86] it is unlikely that these measures can be effective.[87] There remain the final resorts of abandoning the trial or overturning the conviction on appeal. Aside from the fact that such reversals are "incredibly difficult" to obtain,[88] this approach denies the victims justice, risks allowing guilty and sometimes dangerous persons to go free, and undermines public confidence in the criminal-justice system—scarcely a satisfactory result. Moreover, by the time a verdict is overturned on appeal, the defendant may have been incarcerated for a substantial period of time, lost his job, suffered family break-up, and generally had his life pretty thoroughly torn apart.[89] As one survey bluntly concludes, "None of these [neutralizing measures] is satisfactory."[90]

80. Krause, *supra* note 12, at 566.

81. *See also* O'Mara v. Commonwealth, 75 Pa. 424, 428 (1874) (noting that the spread of information in society makes it unlikely that potential jurors will have formed no opinion whatsoever, for "every remarkable event of today is known all over the country to-morrow").

82. Minow & Cate, *supra* note 74, at 650; Krause, s*upra* note 12, at 568–69 & n.256.

83. For a discussion of stealth jurors, see Geragos, *supra* note 10, at 1188–89.

84. *Id.* at 1172.

85. Mu'Min v. Virginia, 500 U.S. 415, 424–45 (1991); *see also* Alfredo Garcia, *Clash of the Titans: The Difficult Resolution of a Fair Trial and Free Press in Modern American Society*, 32 SANTA CLARA L. REV. 1107, 1129 (1992) (contending that "[t]he effect of *Mu'Min* is to leave a criminal defendant virtually powerless in the quest to select an impartial jury").

86. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 691 (1972) (acknowledging that a vast majority of reporter–source relationships remains confidential and immune from grand-jury subpoena power).

87. For discussions of why gag orders may be ineffective, see Krause, *supra* note 12, at 566–67 & n.246; Geragos, *supra* note 10, at 1183; Anderson, *supra* note 12, at 635–36.

88. Brandwood, *supra* note 3, at 1421, 1426.

89. The same happened to Sam Sheppard: when his conviction was eventually overturned he had spent more than ten years in prison. Sheppard then "lost his medical license, became an alcoholic, and died within four years of his acquittal at the age of forty-six." *Id.* at 1423.

90. Donnelly & Goldfarb, *supra* note 60, at 245.

IV

CONCLUSION

U.S. courts should reconsider the possibility of imposing narrowly tailored prohibitions on publishing inadmissible evidence, including prior convictions and other seriously prejudicial material, shortly before and during the trial.[91] Not only would this be solidly supported by the published research by prohibiting only reporting that has been found to be the most damaging to fair trials, it would only bite upon reportage that, since it constitutes an irresponsible attack upon the rights of the individual, should be seen as "low-value" and thus open to regulation. Such bans would enhance U.S. democracy by strengthening the practical implementation of the rule of law and would not represent a governmental attack upon particular groups or points of view. Moreover, even publication of material caught by the order would be only *delayed* until the conclusion of the trial, not prohibited altogether. Bans could be sparingly used, in conjunction with the other methods discussed above.

Perhaps the final observation may be a more impressionistic one. The spectacle of the persistent refusal of U.S. courts to protect individuals from the prejudicial effect of media coverage of their arrest and trials by restraining the media looks from outside the United States like the very *opposite* of American respect for the individual and reverence for individual liberty. Rather, it appears that the rights and freedoms of individuals are being sacrificed to the commercial interests of the mass media and the idle curiosity of the majority. Cases in which a media pack fuels sales by consuming an individual's life and reputation, threatening a miscarriage of justice in the process, cannot without perversity be characterized as the exercise of a vital human right to free speech—or at least not without utterly surrendering the content and meaning of that right to powerful commercial and corporate forces of a kind that John Stuart Mill, with his famous defense of human liberty, never envisaged dominating the so-called marketplace of ideas.[92] As Jeff Fager, executive producer of *60 Minutes*, said of the Duke lacrosse case: "There's something that goes against the American way when a pack rules."[93] A shift from protecting the pack to protecting the individual, by more surely protecting the fairness of trials, would not betray human liberty, or the U.S. Constitution, but vindicate both.

91. U.S. courts could adapt the "active period" used in English law. *See supra* text accompanying note 48.

92. John Stuart Mill, *Of the Liberty of Thought and Discussion*, *in* ON LIBERTY AND OTHER ESSAYS 33 (2d ed. 1863).

93. Rachel Smolkin, *Justice Delayed*, AM. JOURNALISM REV., Aug.–Sept. 2007, at 18, 28 (on file with *Law and Contemporary Problems*), *available at* http://www.ajr.org/article.asp?id=4379.